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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MILWAUKEE BRANCH OF THE NAACP, *et al.*,
Petitioners,

v.

GOVERNOR TOMMY THOMPSON, *et al.*,
Respondents,

and

WISCONSIN ASSOCIATION OF TRIAL JUDGES, *et al.*,
Respondent-Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

I. AT-LARGE ELECTIONS IN MILWAUKEE COUNTY DENY BLACK VOTERS THE EQUAL OPPORTUNITY GUARANTEED BY THE VOTING RIGHTS ACT 1

II. THE SEVENTH CIRCUIT'S RULING THAT THE ANTI-DILUTION PROVISIONS OF SECTION 2 OF THE VOTING RIGHTS ACT CANNOT DEFEAT WISCONSIN'S SINCERELY HELD BELIEF IN AT-LARGE ELECTIONS CONFLICTS WITH THIS COURT'S PRECEDENTS AND WARRANTS GRANTING THE WRIT OF CERTIORARI 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Chisom v. Roemer, 501 U.S. 380 (1990) 5

Houston Lawyers' Association v. Attorney Gen. of Texas, 501 U.S. 419 (1991) 5, 10

Johnson v. DeGrandy, 114 S.Ct. 2647 (1994) 8

Sanchez v. State of Colorado, 97 F.3d 1303 (10th Circuit 1996) *cert. denied*, 117 S.Ct. 1820 (1997) 3

Teague v. Attala County, 92 F.3d 283 (5th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997) 3

Thornburg v. Gingles, 478 U.S. 30 (1986) 2,3,5,6, 7,8,10

Statutes and Regulations

Section 2 of the Voting Rights Act, 42 U.S.C. §1973 ..... *passim*

REPLY TO BRIEF IN OPPOSITION

The Brief for Respondents and Respondent-Intervenors in Opposition ("Brief in Opposition") glosses over the central errors through which the Seventh Circuit's ruling strikes at the core of this Court's precedents and the remedial purposes behind Section 2 of the Voting Rights Act. As this Reply Brief demonstrates, Respondents' arguments are legally and factually incorrect, and review by this Court is vital if Section 2 is not to be a dead letter as applied to at-large judicial elections.

I. AT-LARGE ELECTIONS IN MILWAUKEE COUNTY DENY BLACK VOTERS THE EQUAL OPPORTUNITY GUARANTEED BY THE VOTING RIGHTS ACT

Respondents do not dispute, and barely address, that *no* black candidate has *ever* initially won a seat through a contested election for circuit court, while 40 white candidates have attained seats through contested elections over the last twenty-five years. Milwaukee's current at-large judicial election system therefore affords two divergent paths to the bench, one for black candidates and one for white: blacks may attain a seat through an uncontested election only after first being appointed, while white candidates can reach the bench through both elections and appointment. The Seventh Circuit's failure even to address this stark racial divide completely undermines its ruling that white bloc voting is not legally significant.

In their Brief in Opposition, respondents imply that the number of contested elections featuring black candidates is small, stating that black candidates sought judicial office only six times. Respondents simply ignore the two elections in which black candidates were eliminated in the primary, in addition to

their eight defeats in general elections. In fact, the proof of vote dilution in Milwaukee judicial elections is more extensive than that in *Thornburg v. Gingles*, where results from only three election years were examined in some of the districts at issue. *Gingles*, 478 U.S. 30, 81 (1986) (Appendix). Moreover, given the past results of contested elections for black candidates, it is hardly surprising that more have not run. At trial, Louis Butler, a black candidate who ran unsuccessfully in 1989, explained the reluctance of black lawyers to run:

> [M]any people, in my opinion, are reluctant to run because of the great expense in undertaking a race if one hopes to be successful, trying to make the investment, knowing that in Milwaukee County history, three of the seven black Circuit Judges who have made it to the bench have been defeated. That is the way they've left office, knowing that no black candidate has ever been able to successfully challenge an incumbent in a judicial race, knowing that a black candidate has never been able to successfully challenge for an open seat.... [M]any people consider that to be an insurmountable task and aren't willing to take the risk.

July 11, 1996 Tr. at 62.

Respondents attempt to distract from this point by alluding to evidence at trial which, according to respondents, "revealed" that prevailing white candidate enjoyed "considerable political advantages [over their black opponents] unrelated to race." Brief in Opposition at 15. However, respondents evidence of "non-racial" factors, adduced at trial from white

incumbent judges testifying about their own qualifications in elections, was qualitative, non-statistical, and not objectively verifiable. The Seventh Circuit itself *rejected* these alleged "non-racial" factors as a viable explanation for the black candidates' defeat. App. at 8a. Confronted with a clear statistical showing of persistent racially polarized voting, respondents cannot overcome this evidence by focusing on non-racial factors without providing any objectively verifiable analysis demonstrating how non-racial factors could account for the racially divergent results. *See Teague v. Attala County*, 92 F.3d 283, 290 (5th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997) ("The district court's view disregards the established acceptance of regression analysis as a standard method for analyzing racially polarized voting," citing *Thornburg v. Gingles*, 478 U.S. 30, 52-53 n.20 (1986)); *Sanchez v. State of Colorado*, 97 F.3d 1303, 1315-21 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997) (holding district court erred in rejecting statistical showing of racially polarized voting by citing non-racial factors present in elections, when quantitative analysis did not provide objective support for a non-racial explanation).

Respondents' own statistical evidence here confirmed the racial disparities in black-vs.-white judicial elections found by plaintiffs' expert, Def. Ex. 10, 11, so there is no dispute that black and white voters in Milwaukee County, confronted with the same candidates, differed greatly in their reactions to those candidates. As the Fifth Circuit noted in *Teague*,

> Indeed, the district court did not even have to choose among competing opinions based on the statistics. The results of the regression analyses of both plaintiffs' and defendants' experts were

> consistent. And when the district court looked to lay testimony, even the anecdotal evidence was conflicting.

92 F.3d at 291. Here, too, even the anecdotal evidence conflicted with respondents' theory: successful white candidates acknowledged their own weaknesses ("I don't think most people on the street had any idea who I was," July 15, 1996 Tr. at 127; *id* at 140-141). Other witnesses pointing out the objective advantages enjoyed by unsuccessful black candidates. *E.g.*, July 10, 1996 Tr. at 192-94; *id.* at 133-34; July 1, 1996 Tr. at 25-26; Def. Ex. 88, 90, 95. Respondents' theory in no way explains away the racially disparate voting patterns in this case.[1]

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[1] Respondents attempt to obscure the statistical evidence by presenting half truths about what the evidence actually reveals. First, they focused on the seven primary elections separately, stating the range of white support for the black candidates and touting the fact that the black candidates advanced to the general in five of the primaries. A complete picture of the primary races shows that two of the black candidates in these seven primary elections, Theophilus Crockett in 1973 and Fred St. Clair in 1980, were eliminated outright because of the absence of white support. In the other five, all black candidate advanced to the general election to be defeated (S. Parrish, 1989; C. Parrish, 1979; F. St. Clair, 1979; C. Parrish, 1973, and V. Phillips, 1972). Pl. Ex. 78; *see* App. at 52b-61b. Second, respondents attempt to massage the numbers by arbitrarily isolating the results of elections from 1981 onward, a time frame deliberately chosen to exaggerate the extent of black electoral success. Brief in Opposition at 6, 8 n.6. Because the only two black victories over white opponents occurred in 1981 and 1984, respondents at times describe election results only from 1981, so as to include those victories while excluding several black defeats that occurred only a year or two before 1981. This ploy was specifically disowned by defendants' expert, Dr. Weber, who explained that he used a 1981 cut-off in many of his charts not because of any statistical or political science necessity, but because defense counsel had written their proposed findings of fact using that cut-off. July 12, 1996 Tr. at 135, 212. Dr. Weber acknowledged that it

Respondents also contend that the ability of black candidates to win uncontested elections establishes equal electoral opportunity. Respondents argue that *Gingles* does not bar such a consideration because *Gingles* did not involve judicial elections, in which, according to respondents, it is not a special circumstance to run unopposed.

Respondents do not offer an acceptable rationale as to why *Gingles* should not apply to the analysis of judicial elections. In *Houston Lawyers' Association v. Attorney Gen. of Texas*, 501 U.S. 419 (1991), this Court held that the Section 2 "results" test applies to claims challenging judicial elections. 501 U.S. at 428. *See also Chisom v. Roemer*, 501 U.S. 380, 398 (1990) ("The results test mandated by the 1982 amendment is applicable to *all* claims arising under § 2") (emphasis added). Therefore, as *Gingles* instructs, the ability of a black candidate to prevail in an uncontested election is not generally informative of whether white bloc voting is legally significant. *Gingles*, 478 U.S. at 51 ("the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it -- *in the absence of special circumstances, such as the minority candidate running unopposed*, . . . -- usually to defeat the

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would be equally valid to choose a twelve-year time frame, *id.* at 212-214, in which case the figures would show that *no* black candidate has been successful in *any* contested election, whether running as an incumbent or for an open seat, during the last twelve years. Conversely, if *all* the contested elections with black candidates are included, there have been eight general elections in which black candidates heavily preferred by black voters were defeated by white bloc voting, two additional primary elections in which black candidates were eliminated outright by white bloc voting, and only two elections in which black candidates actually won seats on the court -- both of them when running as incumbents after first being appointed to the seat, and both of them more than 12 years ago. Pl. Ex. 78.

minority's preferred candidate") (emphasis added). The Seventh Circuit contradicted this Court's precedents in ruling otherwise.

Moreover, even if consideration of such evidence were relevant, the record shows that in fact black incumbents have been challenged at a greater rate than white incumbents. Since 1981, only 10% of white incumbents have been challenged compared to 38% of black incumbents, July 9, 1996 Tr. at 114-116; *see* Def. Ex. 133. More importantly, even if a white candidate decides not to run against a black incumbent judge, that decision could be based on any number of factors -- for example, a personal relationship with the particular incumbent, or political enmity between the candidate and another white incumbent whom he decides to challenge instead. Since respondents put on no testimony from any white candidate who had deliberately refrained from running against a black judge, it is purely speculative to draw any conclusions regarding the relative political strength of the black incumbents or the voting behavior of the white electorate based on the fact that particular black incumbents have run unchallenged.

Finally, respondents claim to have missed petitioners' precise point regarding the relevance of proportionality in Section 2 analysis. Although the point may be unclear to respondents, this Court's precedents on the matter are unequivocal. As the petition for writ of certiorari further explains, even if no distinction is made between contested elections (in which black candidates are usually defeated) and uncontested elections (in which, by definition, they are able to prevail), there has been no history of "persistent proportional representation" on the Milwaukee County circuit court or court of appeals that could remotely make out the defense recognized in *Thornburg v. Gingles*, 478 U.S. at 77. *See* Petition for Writ

of Certiorari at 18-19. Indeed, all nine justices in *Gingles* rejected the "proportionality" defense proffered by North Carolina *except* in the one district where black representation on the multimember delegation had been proportional to the black population of the district in *every* election for the previous ten years. 478 U.S. at 77. Respondents do not dispute the gulf between the *maximum* number of black judges that have ever served on the relevant courts at any one time (3 for the circuit court and 0 for the court of appeals) and the number of judges that could be elected from a compact, properly drawn subdistrict having a majority of black voters (up to 9 on the circuit court and one on the court of appeals). Therefore, the election of appointed black judges in uncontested races is irrelevant, because even if those elections are included, respondents cannot demonstrate the type of proportional representation that could make out a defense under *Gingles*.

Because the "proportionality" defense recognized in *Gingles* is unavailable here, whether or not the results of uncontested elections are included, respondents again attempt to evade the *Gingles* standards by creating different tests for proportionality. For example, they imply that the small number of black judges on the bench bears a direct relationship to the pool of lawyers eligible to run for a judgeship. Respondents contend that proportionality should be judged by comparing the percentage of eligible black lawyers among all Milwaukee County lawyers to the percentage of black judges on the bench, and that having three black judges on the circuit court bench is close to the expected result if judges were chosen at random out of the eligible pool of lawyers. Of course, this contention simply ignores the focus of the Voting Rights Act, which is concerned with dilution of the voting strength of minority

voters, not with whether white and black *lawyers* have representation proportional to their numbers.

Indeed, defendants' expert, Dr. Haworth, conceded that if defendants' "random choice" theory were applied to *election* outcomes, the probability that a black candidate would be defeated in 8 of 10 general elections involving one black candidate and one white candidate -- as happened in Milwaukee County -- is only 4% (in other words, a 96% probability that more black candidates would have been elected on the assumption of random choice.) July 12, 1996 Tr. at 21. Dr. Haworth also conceded that the number of eligible black lawyers in Milwaukee County bears no causal relationship to the number of black judges elected to the bench, July 12, 1996 Tr. at 17, and leads to no conclusions at all concerning whether voting is racially polarized, July 12, 1996 Tr. at 16 -- which is, after all, the question that must be answered under *Thornburg v. Gingles.*[2]

By pointing out that black representation on the circuit court and court of appeals is far from proportional to the results that would occur under a district-based plan, petitioners are not arguing that lack of proportionality automatically establishes their claim. Of course, as Justice O'Connor recognized in her concurring opinion in *Johnson v. De Grandy*, 114 S. Ct. 2647, 2664 (1994), lack of proportionality is not dispositive, although it can constitute "powerful evidence of vote dilution." The

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[2] One of the defendant-intervenors in this case is a circuit court judge from Rusk County, Wisconsin, a county in which only 8 attorneys of any race reside. Pl. Ex. 80; *see* July 12, 1996 Tr. at 29-30. If the small number of eligible attorneys there did not prevent the election of a judge, the numbers in Milwaukee County are also not too small to permit the election of additional minority judges.

plaintiffs did not simply rely on the absence of proportional representation on the bench, but conducted extensive statistical analysis to establish that there were deep, persistent racial divisions in voting patterns in the judicial elections at issue, resulting in the usual defeat of the black-preferred candidates. These racial divisions appeared in numerous elections over a long time period, and occurred under all types of factual circumstances that may have varied from election to election. They clearly demonstrate legally significant white bloc voting.

II. THE SEVENTH CIRCUIT'S RULING THAT THE ANTI-DILUTION PROVISIONS OF SECTION 2 OF THE VOTING RIGHTS ACT CANNOT DEFEAT WISCONSIN'S SINCERELY HELD BELIEF IN AT-LARGE ELECTIONS CONFLICTS WITH THIS COURT'S PRECEDENTS AND WARRANTS GRANTING THE WRIT OF CERTIORARI

Respondents do not successfully rebut the fact that the Seventh Circuit has erected a standard under which a state's sincerely held belief in the legitimacy of its own at-large electoral system is enough to deny relief in a Section 2 claim. The Seventh Circuit's failure even to discuss the alternative remedial schemes that would preserve the state's linkage interest while remedying the vote dilution unequivocally demonstrates that the Seventh Circuit treated state interest as preclusive as a matter of law.

As pointed out in the petition for writ of certiorari, under the rule established by the Seventh Circuit, a plaintiff would be required to challenge Wisconsin's sincere belief in its

own system, as opposed to the dilutive effect the system has on their voting strength, as this Court required in *Gingles*. *Gingles*, 478 U.S. at 63-64. The Seventh Circuit determined what it believed to be Wisconsin's interest in maintaining linkage and the sincerity of the state's belief in the legitimacy of its system. The Seventh Circuit did not weigh Wisconsin's belief or its state interest against the evidence of vote dilution and conclude that, on balance, Wisconsin's state interest outweighed the evidence of vote dilution presented in this case, as respondents claim. Instead, the court shifted the focus of the Section 2 inquiry away from an analysis of the *results* of Wisconsin's at-large system to the *intent* of Wisconsin in adopting and maintaining the system, in contradiction of Congressional design and this Court's precedents. *See* Petition for Writ of Certiorari at 22-23.

While respondents defend their sincerely held belief in the legitimacy of linking a judge's electoral base with his or her jurisdiction through an at-large election system by citing their 150 year unbroken history of maintaining the at-large system and their concern for "balanc[ing] the need for independence and impartiality with the desire for accountability," Brief in Opposition at 20, there is nothing unique or distinguishable about Wisconsin's purported state interest. As petitioners stated in their petition for writ of certiorari, if a judicial election system can escape the strictures of Section 2 on such a generic sincerely held belief, this Court's decision in *Houston Lawyers* would have no meaning, as any state could assert such a belief in defense of their discriminatory at-large electoral scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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